Saiful Adlan bin Mohd Nor v Public Prosecutor and another appeal

HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NOS 42S-9–02 OF 2015 AND 42H-14–02 OF 2015
ZULKIFLI BAKAR J
28 JULY 2016

Criminal Procedure — Appeal — Appeal against conviction and sentence — Statutory rape — Stepfather raped minor stepdaughter — Penal Code, s 376(3) — Whether prosecution established prima facie case against accused after maximum evaluation — Whether defence raised reasonable doubt against prosecution's case — Whether charge defective — Whether evidence of child witness corroborated — Whether medical doctor matched description by victim

The appellant ('the accused') was charged for raping his stepdaughter ('PW10'), a minor, an offence under s 376(3) of the Penal Code. PW10 stayed together with her mother ('PW8') and the accused. One night at around 2am, the accused entered PW10's room. PW10 was aware that it was the accused who had entered due to little light from outside even though the room was dark. The accused came and laid down next to PW10, hugged her and inserted his finger into PW10's private part. The accused told PW10 to remain silent. According to PW10, she felt pain from the insertion of the finger into her vagina. On the following day, PW10 alluded that the accused came again at around 1–2 am. The accused laid down on the next to PW10 and took out her underwear. The accused kneeled on the bed to penetrate his penis into PW10's vagina. PW10 further testified that her legs were lying straight during penetration. PW10 also said that she felt her vagina was sticky. PW10 said that the incident happended once a week after the first occurrence. PW10 later left PW8 without her consent and stayed with her biological father ('PW9'). PW9 brought PW10 to lodge a report ('P12') with regard to the incident after PW10 had told the incident to her grandmother ('PW4'). At the end of prosecution's case, the learned trial judge found the prosecution had established a prima facie case against the accused after a maximum evaluation made towards all available evidences. The learned trial judge, at the end of defence's case, found that the defence failed to raise reasonable doubt against the prosecution's case, and after having considered mitigating factors, sentenced him to 15 years imprisonment and ten whippings. Thus this appeal. The accused advanced six issues namely there were no details of exact date and time in the charge; law of corroboration in rape offence; evidences of PW3, PW7 and PW5; evidence of medical doctor ('PW6'); evidences by child witness ('PW10'); and the police report ('P12').

Held, dismissing the appeal:

(1) The charge had given a clear notice to the accused the range of date and time about the incident that took place, although not specific; as the gist was that, the first occurrence of the commission of the rape. So long as the time and/or date or range of date was stated in the charge, it had sufficiently given notice to the accused about the charge he was facing. The victim did not make complaint immediately after the incident and therefore it was not possible to state the exact date and time of the offence in the charge since the victim could not remember the exact date and time (see paras 9 & 11).

(2) It is a trite law that if a child witness does not understand the nature of an oath, she may still be able to give admissible evidence provided the court is of the opinion that the child witness possesses sufficient intelligience to understand the duty of speaking the truth. Furthermore, the law requires this evidence to be corroborated by some other evidence to implicate the accused. In this particular case, there was more than one friend that PW10 had told to. The testimonies of PW3, PW5, PW6 and PW7 had fully corroborated the evidence of PW10 on every material fact essential to constitute the offence of rape (see paras 13 & 19).

(3) The status of old hymen tears and insertion of blunt object into the private part supported the findings that there had been penetration into the victim's vagina. The evidences of PW6 or the medical report must not be considered solely but must be considered with the other evidence in the trial. The result of the independent medical evidence as narrated by PW6 who had interviewed PW10 in the preparation of the medical history, had corroborated the victim's account of the rape in the court of law. The credibility of PW10 was unshaken (see paras 26–27).

(4) The victim is underage, hence consent was immaterial or irrelevant. The victim is still under the care of PW9. It was very apparent that PW9 brought the victim to lodge the report and guided her in making the report as told by her. However, it was the victim who spoke and related the incident by herself to the police when making the report (see para 33).

(5) The court found the learned trial judge had correctly addressed his mind as to the required legal proof and application of law. An appellate court should not disturb or reverse the trial court's finding if the decision was not in error. The decision of the learned trial judge was affirmed and the conviction and sentence as pronounced against the accused was confirmed (see paras 35 & 37).

[Bahasa Malaysia summary

Perayu ('tertuduh') telah dituduh merogol anak perempuan tirinya ('PW10'), seorang di bawah umur, satu kesalahan di bawah s 376(3) Kanun Keseksaan. PW10 telah tinggal bersama dengan ibunya ('PW8') dan tertuduh. Satu malam sekitar 2 pagi, tertuduh telah memasuki bilik PW10. PW10 menyedari

bahawa ia adalah tertuduh yang memasuki biliknya berdasarkan sedikit cahaya yang masuk ke bilik yang gelap. Tertuduh telah datang dan berbaring di sebelah PW10, mem eluknya dan memasukkan jarinya ke dalam bahagian sulit PW10. Tertuduh memberitahu PW10 untuk berdiam diri. Menurut PW10, dia merasa sakit akibat kemasukan jari ke dalam farajnya. Pada hari berikutnya, PW10 telah menyatakan bahawa tertuduh telah masuk sekali lagi sekitar pukul 1–2 pagi. Tertuduh telah berbaring di sebelah PW10 dan membuka seluar dalamnya. Tertuduh telah melutut di katil untuk memasukkan zakarnya ke dalam faraj PW10. PW10 seterusnya memberi keterangan bahawa kakinya terletak lurus semasa penetrasi. PW10 juga menyatakan dia merasakan farajnya melekit. PW10 mengatakan bahawa kejadian itu berlaku sekali seminggu selepas kejadian pertama. PW10 kemudian telah meninggalkan PW8 tanpa persetujuannya dan tinggal bersama bapa kandungnya ('PW9'). PW9 telah membawa PW10 untuk membuat laporan ('P12') berkenaan kejadian itu setelah PW10 memberitahu tentang kejadian itu kepada neneknya ('PW4'). Di akhir kes pendakwaan, hakim perbicaraan yang bijaksana mendapati pendakwaan telah membuktikan kes prima facie terhadap tertuduh selepas penilaian maksimum dibuat terhadap semua keterangan tersedia. Hakim perbicaraan yang bijaksana, di akhir kes pembelaan, mendapati bahawa pembelaan telah gagal menimbulkan keraguan munasabah terhadap kes pendakwaan, dan setelah mengambil kira faktor-faktor mitigasi, menjatuhkan ke atas tertuduh hukuman 15 tahun penjara dan sepuluh kali sebatan. Oleh itu rayuan ini dibuat. Tertuduh telah mengemukakan enam isu iaitu di mana tiada butiran tarikh dan masa sebenar dalam pertuduhan; undang-undang sokongan dalam kesalahan rogol; keterangan-keterangan PW3, PW7 dan PW5; keterangan doktor rawatan ('PW6'); keterangan oleh saksi kanak-kanak ('PW10'); dan laporan polis ('P12').

Diputuskan, menolak rayuan:

(1) Pertuduhan itu telah memberikan notis jelas kepada tertuduh berhubung jarak tarikh dan masa kejadian yang berlaku, meskipun tidak spesifik; kerana secara ringkasnya, kejadian pertama adalah perlakuan rogol itu. Selagi masa dan/atau tarikh atau jarak tarikh yang dinyatakan dalam pertuduhan, ia telah memadai memberi notis kepada tertuduh tentang pertuduhan yang dihadapinya. Mangsa tidak membuat aduan dengan segera selepas kejadian dan oleh itu adalah tidak mungkin untuk dapat menyatakan tarikh dan masa sebenar kejadian dalam pertuduhan oleh kerana mangsa tidak ingat tarikh dan masa sebenar itu (lihat perenggan 9 & 11).

(2) Ia adalah undang-undang nyata bahawa jika saksi kanak-kanak tidak memahami sifat sumpah, dia masih boleh memberi keterangan yang diterima dengan syarat mahkamah berpendapat saksi kanak-kanak itu mempunyai kecerdikan mencukupi untuk memahami kewajipan bercakap benar. Tambahan pula, undang-undang menghendaki

keterangan ini disokong oleh keterangan lain untuk menunjukkan kebersalahan tertuduh. Dalam kes ini, PW10 telah memberitahu lebih daripada seorang kawan. Keterangan-keterangan PW3, PW5, PW6 dan PW7 telah menyokong sepenuhnya keterangan PW10 berhubung setiap fakta material yang penting untuk membentuk kesalahan rogol (lihat perenggan 13 & 19).

(3) Kedudukan koyakan lama dan kemasukan objek tumpul ke dalam bahagian sulit menyokong penemuan bahawa terdapat penetrasi ke dalam faraj mangsa. Keterangan PW6 dan laporan perubatan tidak patut diambil kira semata-mata tetapi perlu diambil kira dengan keterangan lain dalam perbicaraan. Hasil keterangan perubatan berasingan seperti yang dinyatakan oleh PW6 yang telah menemuduga PW10 daam penyediakan sejarah perubatan, telah menyokong cerita mangsa tentang rogol itu di mahkamah undang-undang. Kebolehpercayaan PW10 tidak tergugat (lihat perenggan 26–27).

(4) Mangsa di bawah umur, justeru persetujuan tidak penting atau tidak relevan. Mangsa masih di bawah jagaan PW9. Ia adalah jelas bahawa PW9 membawa mangsa untuk membuat laporan dan membantunya dalam membuat laporan itu sepertimana diberitahu olehnya. Walau bagaimanapun, ia adalah mangsa yang bercakap dan mengaitkan kejadian itu dengan sendirinya kepada polis semasa membuat laporan itu (lihat perenggan 33).

(5) Mahkamah mendapati hakim perbicaraan yang bijaksana telah dengan betul mengarahkan mindanya kepada bukti undang-undang yang diperlukan dan pemakaian undang-undang. Mahkamah rayuan tidak patut mengganggu atau mengakas penemuan mahkamah perbicaraan jika keputusan itu tidak silap. Keputusan hakim perbicaraan yang bijaksana telah disahkan dan sabitan serta hukuman sepertimana dinyatakan terhadap tertuduh adalah disahkan (lihat perenggan 35 & 37).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Abdul Razak Zainal Abidin lwn Pendakwa Raya [2015] 1 LNS 787, HC (refd)
Abdullah bin Borhan v Ketua Polis Melaka & Anor [2008] 8 MLJ 161, HC (refd)
Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal [2015] 2 MLJ 293, FC (refd)
Dato' Seri Anwar Ibrahim v PP [2004] 3 CLJ 737, FC (refd)
Krishnan Chithan v State of Kerala [1962] CriLJ 650, HC (refd)

Muharam bin Anson v PP [1981] 1 MLJ 222, FC (refd)
Nanchatar Singh v PP [1986] 2 CLJ 452, HC (refd)
Noor Afzal bin Ahmad v Saifuddin bin Md Mokhtaraddin [2008] MLJU 720; [2008] 1 LNS 593, HC (refd)
Pendakwa Raya lwn Mohamad Malek Ridhzuan bin Che Hassan [2014] 1 MLJ 363; [2013] 8 CLJ 359, CA (refd)
Pie bin Chin v PP [1985] 1 MLJ 234 (refd)
PP v Mardai [1950] 1 MLJ 33 (folld)
R v Baskerville [1916] 2 KB 658, CA (folld)
R v Whitehead [1929] 1 KB 99, CA (refd)
Syed Abu Tahir a/l Mohamed Esmail v PP [1988] 3 MLJ 485, HC (refd)

Legislation referred to

Evidence Act 1950 ss 133A, 157

Yusman bin Mohd Badar (Chambers of Yusman Azlin Anwar) for the accused.
Mariah bt Omar (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Zulkifli Bakar J:

INTRODUCTION

[1] The appellant ('the accused') in this case was charged raping his stepdaughter ('PW10') age 13 years and four months old at the time of the incident. The charge against the accused read as follows:

> Charge:
>
> Bahawa kamu pada bulan Mac tahun 2012, tarikh tidak pasti di antara jam lebih kurang 12.00 malam hingga 2.00 pagi di alamat No 36, Jalan Pulau Angsa U10/U32A Seskyen U10 Shah Alam di dalam daerah Petaling di dalam Negeri Selangor Darul Ehsan, telah merogol satu perempuan Melayu, Syafira Irwayu bt Mohd Royzilee Kpt: 990408-14-7096 berumur 13 tahun 4 bulan yang mana oleh kerana perhubungan kamu dengannya adalah tidak dibenarkan dibawah undang-undang hukum agama, adat atau kebiasaan untuk berkahwin dengannya dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah seksyen 376(3) Kanun Keseksaan.

[2] This appeal was heard before me was on 11 February 2016 and I affirmed the learned trial sessions court judge's decision on both conviction and sentence. I now give my grounds.

BACKGROUND FACTS

[3] The facts are summarised as follows:

(a) the victim ('PW10') stayed together with her mother ('PW8') and the accused (stepfather). The accused was self-employed as musician and music teacher, whilst PW8 worked as money broker during daytime and singer at night;

(b) one night at around 2am, the accused entered the room of PW10 and her younger sibling (Syaria Insyirah). PW10 was wearing T-shirt with trousers;

(c) at that material time, PW8 was sleeping;

(d) PW10 was aware that it was the accused who had entered due to little light from outside even though the room was dark at that time;

(e) the accused came and laid down on the left side of PW10 whilst her younger sibling was on her right side. The accused subsequently hugged PW10 and inserted his finger into PW10's private part (PW10 did not know which exact finger was inserted). Meanwhile, the accused told PW10 to remain silent. According to PW10, she felt pain from the insertion of the finger into her vagina;

(f) on the following day, PW10 alluded that the accused came again at around 1–2am. The accused laid down on the bed on the left side of PW10 and took out her underwear leaving the clothes worn by PW10;

(g) the accused kneeled on the bed to penetrate his penis into PW10's vagina. PW10 further testified that her legs were lying straight ('*terlentang kaki lurus*') during penetration. PW10 also said that she felt her vagina was sticky;

(h) after that, PW10 cried and the accused asked PW10 to not tell anyone. On the next day, PW10 discovered blood near her vagina when she woke up;

(i) PW10 said that the incident would happen once in a week after the first occurrence. Notwithstanding this, the prosecution had expressed its stand lucidly that the subject matter of the charge against the accused in this case was only to one fateful event occurred in March but not the events subsequent to that (p 98, record of appeal, Vol 1);

(j) PW10 told the incident to Ainnur Maisarah ('PW7') who was her closed friend since Form 1, and then to other friends, viz, Mohd Azran Ariff ('PW3') and Nur Farhana ('SD3') and also to Pn Nor Qistina ('PW5') who was her counselling teacher;

(k) in November 2012, PW10 left her mother ('PW8') without her consent and stayed with her biological father, Royzale bin Mustapha ('PW9'). Until on 9 January 2013, PW9 brought PW10 to lodge a report ('P12') with regards to this incident after PW10 had told the incident to her

grandmother (ie PW9's mother who was also known as PW4 during trial) and the grandmother ('PW4') informed PW9; and

(l) the accused was arrested on 10 January 2013 at IPD Shah Alam.

[4] At the end of prosecution's case, the learned trial judge found the prosecution had established a prima facie case against the accused after a maximum evaluation made towards all available evidences.

[5] The defence was called. The accused opted to testify under oath. In addition, the defence called two witnesses namely Pn Chewah Abd Wahab ('SD2') who is the accused's mother in law/PW8's mother; and Nur Farhana ('SD3').

[6] The learned trial judge in the end of defence's case found that the defence failed to raise reasonable doubt against the prosecution's case, and after having considered mitigating factors especially the accused suffered irritable bowel syndrome, sentenced him to 15 years imprisonment and ten whippings.

THE APPELLANT'S (ACCUSED) CONTENTIONS

[7] The accused had raised or advanced *six issues* during the hearing of this appeal:

(a) no details of exact date and time in the charge;

(b) law of corroboration in rape offence;

(c) evidences of PW3, PW7 and PW5;

(d) evidence of medical doctor ('PW6');

(e) evidences by child witness ('PW10'); and

(f) value of police report ('P12').

MY FINDINGS

First issue: No details of exact date and time in the charge

[8] The defence submitted that the prosecution had failed to prove every element in the charge against the accused because there was doubt arisen as to the exact time and date of the occurrence of the offence and thereby had caused miscarriage of justice to the accused in this case.

[9] It appears unmistakably for me, from the charge, it had given a clear notice to the accused the range of date and time about the incident that took place, although not specific; as the gist is that, the first occurrence of the commission of the rape.

[10] In the case of *Abdullah bin Borhan v Ketua Polis Melaka & Anor* [2008] 8 MLJ 161, it was decided by Low Hop Bing J (as he then was):

> It is trite law that the charge in question must be precisely formulated to include the specific accusation against *the plaintiff who has the right to know and must have notice of the very nature of the charge at the first opportunity, so that the plaintiff is forewarned with clarity and certainty the essential elements or ingredients against him in order to ensure that he can be forearmed in his defence* for the purpose of directing all the evidence exclusively to the specific charge. (Emphasis added.)

[11] I found that so long as the time and/or date or range of date is stated in the charge, it has sufficiently given notice to the accused about the charge he is facing. The victim did not make complaint immediately after the incident and therefore it is not possible to state the exact date and time of the offence in the charge since the victim could not remember the exact date and time.

[12] In my considered opinion, the object of the charge is to give notice to the accused of the alleged offence that took place with the additional information as to the date and time and place where it is alleged to have been committed. From the very outset of the facts, I found the defence here was able to understand the charge and had competently adduced his defence. In this regard, the accused's right was never being prejudiced and in this case I found that the charge is valid and had given proper notice to the accused.

Second issue: Law of corroboration in rape offence

[13] It is a trite law that the child witness if does not understand the nature of an oath may still able to give admissible evidence provided the court is of the opinion that the child witness possesses sufficient intelligience to understand the duty of speaking the truth. But, the law requires this evidence to be corroborated by some other evidence to implicate the accused (see s 133A of the Evidence Act 1950).

[14] Nevertheless in the present case, the learned trial judge after conducting sufficient inquiry had ruled that the child victim ('PW10') could appreciate the meaning of 'oath' and gave admissible sworn evidences via video links in the trial (see *Muharam bin Anson v Public Prosecutor* [1981] 1 MLJ 222).

[15] The defence submitted that it is a rule of prudence and practice that in this type of sexual offence to require PW10's evidence to be corroborated and

argued there is no corroborating evidence found in the present case. Further, the defence expressed that the learned trial judge had misdirected himself when failing to state that he had warned himself of the possible danger in acting on such uncorroborated evidences of PW10.

[16] I do not agree with learned counsel for the defence. In my considered opinion, it is obligatory for the learned trial judge to warn himself if only there is a risk in convicting the accused on the uncorroborated evidences by the child witness. However, it is contrary to the present fact. Scrutinising the record of appeal, I found that the learned trial judge had clearly stated in his judgment that the evidences given by prosecution witnesses (PW3, PW5, PW6 and PW7) had corroborated PW10's evidences and thus it does not attract the necessity to give cautious warning.

[17] Bearing in mind that, it is a matter of practice and not rule of law to establish requirement of corroboration in sexual offences (see Federal Court case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; *Pendakwa Raya lwn Mohamad Malek Ridhzuan bin Che Hassan* [2014] 1 MLJ 363; [2013] 8 CLJ 359). However, in this case the learned trial judge had decided that there were corroborating evidences, which I believe this would provide overwhelming reliable proof to strengthen PW10's credibility.

[18] I rely on the case of *Public Prosecutor v Mardai* [1950] 1 MLJ 33 and it was held as follows:

> *Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated*; nevertheless it appears to me, as a matter of common sense, to be *unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story* ... (Emphasis added).

[19] As I have said above, it is still has to be considered now, whether the evidences of PW3, PW5, PW6 and PW7 had been properly held as corroborative evidences of PW10's evidence. I found and I agree with the learned trial judge that the testimonies of PW3, PW5, PW6 and PW7 had fully corroborated the evidence of PW10 on every material fact essential to constitute the offence of rape. Corroboration may be by facts and circumstances (see *Krishnan Chithan v State of Kerala* [1962] CriLJ 650). I now proceed to give my reasons of my conclusion which are also tied down with the third and fourth issue.

Third issue: Evidences of PW3, PW7 and PW5

[20] The defence alluded that the testimonies given by PW3, PW5 and PW7 were merely repetition since they heard the story from PW10 (the source), supported by the case of *R v Whitehead* [1929] 1 KB 99 to illustrate that these evidences could not amount to corroboration as the victim could not corroborate herself.

[21] Guided by the principle enunciated in *R v Baskerville* [1916] 2 KB 658, corroboration means to take independent evidence which implicates the accused in the aspect either connecting or tending to connect him with the alleged crime, other than from the victim.

[22] On this significant finding of fact, I would say it is on the case to case basis. It is an ancient rule that the corroboration must come from an independent source. However, the 'independent source' should only relate to scientific evidences found at the crime scene. In my opinion, it is impossible to say independent source must come from 'a person' since rape occurrence is between the perpetrator and the victim, even more, only the party involved would know about the incident of rape.

[23] From the above-enumerated, 'independent' corroboration concept does not apply to PW3, PW5 and PW7, meaning to say that it is not necessarily confined or restricted to the oral testimony of an independent witness.

[24] In my consideration, I conclude that there is sufficient degree of corroboration of evidences given by PW3, PW5 and PW7 with the following reasons:

(a) PW3 and PW7 are friends of the victim. I appreciate the courages shown by PW3 and PW5 in testifying during the trial. Also for PW10, at that age she could share the traumatic experience with friends, ie PW3, PW7 and SD3. In this particular case, there was more than one friend that PW10 had told to;

(b) the defence alleged that the contradiction happened between the statements given by PW3 that, '*kawan baik dengan PW10*' and '*tidak cukup rapat dengan PW10*' (pp 32–34, record of appeal, Vol 1), had affected PW3's credibility. However, this court found that there was no material contradiction as this is a question of fact and in fact as stated by PW10 herself and PW7 to conclude PW3 is indeed PW10's good friend. The defence's allegation is baseless;

(c) the defence submitted as for PW7 that, the time of knowing this from PW10 is different as testified by her. PW7 said that she knew this from

PW10 in about 5–6 months after the incident (p 61, record of appeal, Vol 1) whilst according to PW10 she told this to PW7 the next day (p 99, record of appeal, Vol 1). After assessing evidence in the notes of proceedings as at p 99, record of appeal, I found that PW10 had informed the court that the sexual intercourse between her and her stepfather (the accused) would happen once a week and it appeared that the victim might have toldl the next day after the occurrence of that particular act, but not in regard of the first incident. Nevertheless, this court found that this is a non-material aspect as the essence part of this is to indicate that PW7 came to know of the incident of sexual intercourse from PW10;

(d) following that, PW10 adhered to PW7's advice to meet the counselling teacher ('PW5'), which I believe being a difficult thing to do for PW10. As the incident did happened, PW10 was willing to meet PW5 for counselling;

(e) this court is satisfied with the explanation of PW5 when she said she did not report this to police earlier because she had to assess the fact that PW10 was consenting to the sexual intercourse. PW5 had testified, PW10 told her that she was closed to the accused and also love ('*sayang*') the accused. PW5 testified that PW10 was worried because she did not intend to have the sexual relationship over and over again (p 45, record of appeal, Vol 1); and

(f) further, the defence raised the discrepancy in PW5's evidence where PW5 testified that from what she remembered, the victim ('PW10') told her that it was a double deck bed (*katil bertingkat*) where the rape took place (p 44, record of appeal, Vol 1). But, through description from PW10 in regard to the commission of the rape, it was reasonable to make inference that it had happend on a single deck bed (p 95, record of appeal, Vol 1) as PW10's younger sibling was sleeping at her right side. On this issue, I found that this is immaterial to render the entire of PW5's evidence becoming incredible as it is a normal course that such discrepancy due to forgetfulness or failure to recall exactly certain events (see *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234). This is also because there are many students other than PW10 in the school seeking counselling from PW5 and telling their stories to PW5. What is important is, PW5 was told by PW10 regarding the incident of rape happened whilst PW10 was sleeping in her bed.

Fourth issue: Evidence of medical doctor (PW6)

[25] In addition, the defence argued that evidence of PW6 was not sufficient to corroborate PW10 since PW6 had only emphasised the tear of hymen and

did not deny the possibility of insertion of blunt object which did not confirm it was the penis. PW6 also testified being unable to know the age of the tear (p 54, record of appeal, Vol 1).

[26] Having perused the evidences with care as a whole, I found the status of old hymen tears and insertion of blunt object into the private part supported the findings that there had peen penetration into the victim's vagina. The evidences of PW6 or P6 (medical report) must not be considered solely but must be considered with the other evidence in the trial (P6 at p 308, record of appeal, Vol 2).

[27] In the circumstances, I found the result of the independent medical evidence as narrated by PW6 who had interviewed PW10 in the preparation of the medical history, had corroborated the victim's account of the rape in the court of law (see *Syed Abu Tahir a/l Mohamed Esmail v Public Prosecutor* [1988] 3 MLJ 485). Overall, the medical evidence ('P6') was held to be associated with a positive legal outcome to show the blunt object being 'penis' where it was introduced into PW10's private part, afforded to logical fact that PW10 said she felt her private part was sticky (p 97, record of appeal, Vol 1).

Fifth issue: Evidences by child witness (PW10)

[28] It is pertinent to note the defence's argument which had advanced that PW10's statements were full of doubts and uncertainty, therefore it created great loopholes to the prosecution's case. This court posited that:

(a) the defence submitted that the posture described by PW10 in relating to the sexual intercourse was too extraordinary until it indicated that it has actually never happen. PW10 had said,

> Papa melutut di antara kaki kiri dan kaki kanan saya. Tangan papa dekat katil. Badan papa melutut atas katil. Waktu itu *badan papa tegak* ... (Emphasis added.)

however, this court decided that it must be read as a whole, unlike the defence who read certain words in isolation. PW10 had said very clearly the posture of the accused was 'kneel down' (*melutut*), which is convincing for the sexual intercourse to take place;

(b) further, the defence pointed the unreasonable position of the victim's legs were lying straight ('*terlentang kaki lurus*') during penetration. This court had perused the record of appeal carefully and found PW10 had explained to the court that the position of the legs was within 'V' shape with the legs straight (from p 96, record of appeal, Vol 1), thus this enable the reasonable acts for sexual intercourse. The defence should have scrutinised it reasonably;

(c) the defence submitted that PW4 (the mother of the victim's father/grandmother) had testified that PW10 was the type of a day-dreaming person. In the event, this court found the relevant notes to explain the statements by PW9, as follows:

> When PW9 was re-examined:
>
> S: Tadi juga peguam ada nyatakan berkenaan dengan ibu kamu yang telah memberi tahu mahkamah yang Syafira ini kuat berangan yang kamu nyatakan, saya rasa saya tahu. Daripada mana yang kamu tahu ibu kamu bagi tahu mahkamah yang dia kuat berangan.
>
> J: Macam saya suruh dia buat suatu benda itu macam dia terlupa ambil suatu barang tersebut.
>
> (p 91, record of appeal, Vol 1)

It is abundantly clear to see the said 'day-dreaming' (*kuat berangan*) was only meant to be applied to the situation where PW10 always forgot to take something as instructed by PW4. Noteworthy, it does not mean at any time to say PW10 likes to imagine and creating stories or to make up stories or telling stories which are untrue;

(d) statements from DW2 (the mother of the victim's mother/grandmother) who said that PW10 had never called her and she could not contact PW10 thinking that PW10 might change her handphone number (p 143, record of appeal, Vol 1), which had contradicted to what PW10 had said that she had received call from DW2 to ask her the reason of running away from her mother (p 100, record of appeal, Vol 1). Nevertheless, this small discrepancy did not affect the strength of the prosecution's case and had nothing to do with the subject matter of the charge. It is not to forget that she was angry with the victim's biological father ('PW9') since she became his guarantor of a Hyundai Atos car in which having the issue of money. Along the trial, DW2 talked more on the car loan rather than the rape incident (pp 143–145, record of appeal, Vol 1); and

(e) the defence also called DW3 (friend of the victim) to adduce evidence that the victim had a boyfriend namely PW3, to attack the PW3's credibility. In my opinion, this argument was groundless as the gist of PW3's evidence was to confirm that PW3 knew the incident from PW10 and this is to corroborate PW10's evidence. Relationship between PW3 and PW10, if real as stated by DW3, would only confirm the gist of the evidence.

[29] This court found that, the defence's arguments, as aforementioned, towards the credibility of the victim ('PW10') are devoid of merits. I decided the credibility of PW10 was unshaken.

Sixth issue: Value of police report (P12)

[30] The defence put forward the issue of questioning the victim who had delayed in making a police report about this incident. On 9 January 2013, the report ('P12') was lodged, whereby there was approximately ten months from March 2012 (the time of the first incident). A case was cited to illustrate the possibility of ample opportunity to allow fabrications and hence a complaint must be made promptly at the earliest time, see *Nanchatar Singh v Public Prosecutor* [1986] 2 CLJ 452.

[31] The defence further submitted that PW9 had confirmed that he was making the report ('P12') for about an hour (p 90, record of appeal, Vol 1). PW10 also expressly testified that she was aided by PW9 in making the report ('P12') where she was only asked to sign (p 108, record of appeal, Vol 1).

[32] As it were, I am in the view that it only showed that the victim did not intend to lodge a report but went along with her father ('PW9') to make the report. Pursuant to the above, the report was made at the earliest convenient time once PW9 discovered the incident. Therefore, no fabrications should be alleged in this situation.

[33] I am of the further view that the victim is underage, hence consent issue is immaterial or irrelevant. The victim is still under the care of guardian ('PW9'). It is very apparent that PW9 brought the victim to lodge the report and guided her in making the report as told by her, meaning to say, it was the victim who spoke and related the incident by herself to the police when making the report (p 101, record of appeal, Vol 1).

[34] Going through the judgment of the learned trial judge, I found no ruling on the 'value' of P12 was discussed thereof. On this subject, I found the police report (P12) have no corroborative value as the maker (victim) cannot corroborate herself. It would only good to conclude that the report (P12) was merely a consistency to indicate the testimony by the victim is with regard to same fact as a statement previously made under the scope of s 157 of the Evidence Act 1950 (see *Noor Afzal bin Ahmad v Saifuddin bin Md Mokhtaraddin* [2008] MLJU 720; [2008] 1 LNS 593; *Abdul Razak Zainal Abidin lwn Pendakwa Raya* [2015] 1 LNS 787).

CONCLUSION

The accused's appeal

[35] For all the reasons adduced, this court found the learned trial judge had correctly addressed his mind as to the required legal proof and application of

law. Clearly, an appellate court should not disturb or reverse the trial court's finding if the decision was not in error. Hence, the accused's appeal is dismissed (see *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2004] 3 CLJ 737).

The prosecution's appeal

[36] In effect, this court actually opined the heavier sentence should have been imposed against the accused. However, I took great care to observe that the prosecution had made a serious error in the charge sheet (p 26, record of appeal, Vol 1), stating the maximum imprisonment in law is '20 years', while in fact it is '30 years'. This court is cautious to take into account this error made by the prosecution and thinks it might be the reason leading to the sentence passed by the learned trial judge. In this regard, it justifies that this court to decide the prosecution's appeal be dismissed. The prosecution in their submissions also had not persuaded this court for the sentence be enhanced.

[37] For the foregoing reasons and after considering the whole circumstances of this case, this court affirms the decision of the learned trial judge. The conviction and sentence as pronounced against the accused is confirmed.

Additional notes

[38] Under the Case No 44–22–02 of 2016 filed by the applicant ('the accused'), this court allowed the application for the accused to be released on bail pending execution of the sentence until the hearing of the appeal in Court of Appeal.

Appeal dismissed.

Reported by Afiq Mohamad